ing such an action, under the Bankrupt Act of 1867, is much stronger. The Act of 1841 merely provided, as the present act provides, that the bankrupt's title to all his property should vest in his assignee, with the right to sue for the same: 5 U. S. Statutes at Large 442, 443. But the Bankrupt Act of 1867 goes a step further, and, in the 14th section, declares that, "All the property conveyed by the bankrupt in fraud of his creditors * * * * * shall, in virtue of the adjudication of bankruptcy and the appointment of his assignee, be at once vested in such assignee."

Counsel for the defendant insist, however, that the 35th section of the act modifies the language of the 14th section above cited, and limits the right of action to set aside fraudulent conveyances to four, or, at most, six months. But I cannot assent to this construction. I think the provision above cited from the 14th section relates to the state statutes against fraudulent conveyances, and to these only; and that the 35th section of the Bankrupt Act has no reference to those statutes, but is only intended to reach frauds on the Bankrupt Act. The two sections relate to different subjects; neither of them, therefore, can be construed as explaining, modifying, or limiting the operation of the other.

On the whole, I conclude that an assignee in bankruptcy may maintain an action to set aside fraudulent conveyances made by the debtor before he is adjudged a bankrupt, and even before the Bankrupt Act was passed, provided the person to whom the transfer was made was a party to the fraudulent intent, or received the transfer without valuable consideration, and provided the action is not barred by the Statute of Limitations.

The demurrer is overruled.

ABSTRACTS OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF NEW YORK.[1]

COMMON CARRIERS.

Limitation of Liability.—A common carrier cannot limit his liability by a memorandum or note on the card or ticket which he delivers on the

[1] From Hon. O. L. Barbour; to appear in Vol. 49 of his Reports.

receipt of goods to be transported by him: *Limburger* v. *Westcott*, 49 Barb.

Thus, where, by a memorandum on a receipt for baggage, issued by an express company, it was stated that the liability of the company was "limited to $100, except by special agreement to be noted" thereon, *Held*, that in the absence of any knowledge by the owner of the baggage of such condition, there was no consent to it by him, and no bargain between the parties, limiting the liability of the company: *Id.*

Corporation.

Who are to be deemed Servants of.—A person employed by a manufacturing corporation as its *civil engineer* and *travelling agent*, at a fixed salary, is a *servant* of the corporation, within the meaning of the 18th section of the Act of the legislature of 1848, which makes the stockholders of such corporations personally and individually liable for debts due to their laborers, *servants*, and apprentices: *Williamson* v. *Wadsworth*, 49 Barb.

Damages.

For refusing to deliver Bonds bought.—In an action to recover damages for refusing to deliver bonds, alleged to have been bought by the defendant as the plaintiff's agent, the plaintiff, to prove the value of the bonds, may show that they were paid by the company issuing them in gold. He may also prove what gold was worth, in currency, at that time: *Simpkins* v. *Low*, 49 Barb.

It is erroneous to limit the plaintiff's recovery, in such an action, to nominal damages, where there is proof that the bonds were worth par, in gold, as collateral security, and the evidence warrants the conclusion that they were worth more than par, in currency: *Id.*

Such evidence should be submitted to the jury, and it should be left with them to assess the damages, free from any restriction. The Legal Tender Act, passed by Congress, is not to be construed as excluding such evidence from the consideration of the jury: *Id.*

It was not intended, by that act, to enable an agent, after having received for a claim gold coin, to relieve himself from liability by payment in currency: *Id.*

Frauds, Statute of.

Memorandum in Writing.—The receipt by mail, by a purchaser, of a bill of the goods purchased, containing the terms of sale, will not take a parol contract of sale out of the Statute of Frauds; but either party may repudiate such contract, at any time before the actual receipt and acceptance of the goods by the purchaser: *Pike et al.* v. *Wieting et al.*, 49 Barb.

Husband and Wife.

Suits between.—At common law, a suit was maintainable, in equity, by a wife against her husband, to recover money, the separate property of the wife, which he had wrongfully taken and converted, and the Code of Procedure having abolished the distinction between equitable actions and actions at law, and the old forms of pleadings, a complaint setting forth such a state of facts and praying judgment against the defendant for the amount taken by him and converted to his own use, states a good

cause of action, and is therefore not demurrable: *Whitney* v. *Whitney*, 49 Barb.

Injunction.

To restrain proceedings in Courts of a sister State.—While, as a general rule, the courts of this state decline to interfere by injunction, to restrain its citizens from proceeding in an action which has been commenced in a court of a sister state, there are exceptions to this rule; and when a case is presented, fairly constituting such exception, extreme delicacy should not deter the court from controlling the conduct of a party within its jurisdiction, to prevent oppression or fraud. No rule of comity or policy forbids it: *Vail et al.* v. *Knapp et al.*, 49 Barb.

Mandamus.

Discretion as to granting.—The court may exercise a discretionary power as well in granting as in refusing a *mandamus;* as where the end is merely a private right, and where the granting of it would be attended with manifest hardships and difficulties. This discretion should be exercised soundly, and in accordance with the peculiar circumstances of the case: *The People ex rel. Hackley et al.* v. *The Croton Aqueduct Board*, 49 Barb.

The defendants issued proposals for the building of a stone tower, engine-house, &c. The relators were the lowest bidders for the work, but the defendants refused to award the contract to them, or to any one else, for the alleged reason that no appropriation to cover the expense existed; that they had changed the design and character of the work to be done, and decided that the public interests required that the work should be re-advertised and let under proposals framed in accordance with such alterations. *Held*, that the issuing of the notice inviting proposals did not alone and of itself bind the defendants to award the contract to the lowest bidder, or create any obligation, on their part, to award it at all. But that, if the bids were extravagant, or far beyond the amount of the contemplated expenditure, they might, in their discretion, reject them altogether. And that, under the circumstances, it would not be a proper exercise of judicial power to grant a *mandamus* to compel the defendants to award the contract for the work in question to the relators: *Id.*

Master and Servant.

Liability of Master to Servant for Negligence.—Ordinarily, an employer is not liable for injuries to one of his employees occasioned by the negligence of another employee engaged in the same general business. Such employees, on entering the service, take upon themselves, as an incident to the hiring, the ordinary risks and dangers arising therein, which includes the negligence or carelessness of their fellow-servants: *Faulkner* v. *The Erie Railway Company*, 49 Barb.

No distinction arises from the different grades or ranks of the employees, nor from their being engaged in different kinds of work; provided the services tend to accomplish the same general purpose: *Id.*

An employer is, however, responsible for injuries to employees arising from his personal neglect, or from the want of ordinary care and precaution on his part in the selection of employees: *Id.*

Principal and Agent.

Authority of a General Agent—particular instructions.—If a general agent has received particular instructions, which he disregards, his acts as agent are, nevertheless, binding upon the principal. As between the principal and a general agent, any deviation from particular instructions will render the latter accountable to the former for any loss he may sustain in consequence of such deviation; but, as to third parties, who may have dealt with the agent, any limitation of the authority, not communicated to them, will have no effect: *Edwards* v. *Schaffer et al.*, 49 Barb.

P., who purchased of the plaintiff certain goods for the defendants, was employed by the latter to transact their business in that branch of their commercial house situated in the city of New York. They had a manufacturing establishment in Prussia; they transmitted a portion of the goods there manufactured to New York, which were sold there by P., who was in the habit of purchasing goods for them there to be used in their manufactory in Prussia. P. published notices and wrote letters in the defendants' name and style; and acted precisely as his principals would have done had they been here. The firm-name of the defendants was on the sign over the door of their place of business in New York; and when payment for the goods was demanded, P. wrote a note, signed in the name of the firm, promising payment at an early day. *Held*, that this was sufficient to show that P. was the defendants' *general* agent, acting as their representative to do everything for them which the necessities of their business here required. And that in the absence of any instrument expressly appointing him to do this, the facts showed an *implied authority*: *Id.*

Where principals accept, and pay for, a portion of the goods purchased for them by their agent, they thereby dispense with any particular instructions directing that the whole shall be delivered at once. If they design to accept no more than the portion already delivered, they should give early notice of that intent: *Id.*

Railroad Companies.

Liability for defective Bridges.—Where a railroad bridge was well built, of good sound materials, upon a plan in common use, and the evidence as to its strength and capacity was abundant, and its sinking was in no sense due to any defect in its original construction, but to a process of natural decay called dry-rot; and the day before it fell it had been inspected by the repairer of bridges and the division superintendent, competent men, and examined, tested, and watched under the weight of a train of cars: *Held*, that the company was not liable to the representatives of an employee who was killed by the falling of the bridge, either on the ground of a defect in its construction constituting negligence or want of ordinary care, or by reason of the employment of incompetent, unskilful, or improper persons to examine the bridge: *Faulkner* v. *The Erie Railway Company*, 49 Barb.

Held, also, that to render the company liable, on the latter ground, it must affirmatively be made to appear that proper care was not used in the selection of its agents; and that by the exercise of proper care those

agents would have been rejected as incompetent. The company is not a guarantor of competency or fitness in its employees: *Id.*

Held, further, that the company was not responsible for the insufficiency of the bridge, in the absence of notice, unless the company was ignorant of its condition through its negligence or want of proper care: *Id.*

Must accept Legal Tender Notes for Fares.—Under the Act of Congress approved February 25th 1862, authorizing the issue of United States notes, and declaring that they shall "be lawful money and a legal tender for all *debts*, public and private, within the United States, except duties on imports," &c., a railroad company is bound to accept United States notes issued in pursuance of that act, at the value expressed on the face of them, in payment of fares upon its railroad, when demanded in advance of transportation on such road: *Lewis* v. *The New York Central Railroad Company*, 49 Barb.

If it exacts payment of the legal fare of a passenger, in advance, in gold or silver coin of the United States, or the market value of such coin in United States notes, it will be guilty of extortion, and liable to the penalty imposed by the Act of the legislature of March 27th 1857, for asking and receiving a greater rate of fare than that allowed by law: *Id.*

Ships and Vessels.

Attachments against.—Within the contemplation of the Act of the Legislature of April 2d 1862, providing for the collection of demands against ships and vessels, and other similar statutes, the place where the services are in fact rendered, although they are rendered under and in pursuance of a contract made at another place, is the place where the debt is deemed to have been contracted: *Mullin* v. *Hicks*, 49 Barb.

Thus, where a contract was entered into at the city of New York, between the plaintiff and the master of a vessel, by which the former agreed to load the vessel with oak timber, for a specified sum; and the ship—then lying at Brooklyn—was afterwards moved to Weehawken, in the state of New Jersey, where she was loaded by the plaintiff, under and in pursuance of the contract, it was *held*, that the sum due to the plaintiff, for his services in loading the ship, was not a debt contracted within the state of New York, nor a subsisting lien upon the vessel, for which an attachment could be issued under the statute: *Id.*

Stamps.

On Chattel Mortgages.—The latter clause of the provision of the Internal Revenue Act of the United States, authorizing the collector to allow stamps to be affixed to mortgages, when they have been omitted without intent to evade the provisions of that act, or to defraud the government, but declaring that "no right acquired in good faith before the stamping of such instruments * * * and *the recording thereof*, if such record be required by law, shall in any manner be affected by such stamping," &c., does not apply to *chattel mortgages*, inasmuch as it contemplates mortgages which require to be recorded: *Vail et al.* v. *Knapp et al.*, 49 Barb.

Chattel mortgages are merely filed, and an entry made in a book kept

by the clerk, of the names of the parties, the amount secured, the date, time of filing, and when due. This cannot be regarded, in any proper sense, as *recording* a mortgage: *Id.*

The statute is highly penal, and should not, even in a doubtful case, receive a construction which would invalidate the security: *Id.*

On Mortgages to secure Contingent Liabilities.—Under the provision of Schedule "B" of the Revenue Act, specifying among the instruments which require to be stamped "Mortgage of lands, estate, or property, real or personal * * * where the same shall be made as a security for the payment of any definite and certain sum of money lent at the time, or previously due and owing, or forborne to be paid, being payable," no stamp is necessary upon mortgages executed to secure the mortgagees as drawers and indorsers of drafts drawn for the benefit of the mortgagors, and payable *subsequent to the execution of such mortgages*, where no money was lent at the time, nor had any become due and owing, nor was any forborne to be paid, *being payable: Id.*

WILL.

Construction of.—A testator devised to his wife and daughter, each, the equal one-half part of his estate, real and personal, share and share alike, subject to these restrictions, viz.: that each of the devisees was vested with a power of testamentary disposition, unaffected by any trust or limitation; but in case of the death, *intestate and without issue*, of either devisee, whatever might remain of the said property was devised to the survivor. *Held*, that each devisee might, during her lifetime, dispose of the entire fee of the estate devised to her, for her own benefit; and that, the devisees having united in a conveyance to a purchaser of the premises, with covenants of warranty, such conveyance passed all the title of the grantors, either vested or contingent; that such title was good, and the purchaser was in equity bound to accept it: *Freeborn et al.* v. *Wagner*, 49 Barb.

Publication.—To constitute a valid publication of a will or codicil, the testator must, in the presence of two witnesses, declare the instrument to be his last will and testament, or a codicil thereto. If the proof fails to establish such a declaration, to one of the subscribing witnesses, the instrument should not be admitted to probate: *Abbey* v. *Christy*, 49 Barb.

Where one of the attesting witnesses testified that on entering the testator's room, the latter, taking a paper out of his portfolio, desired the witness to read it, which he did, silently; after which the testator requested him to witness his signature; in answer to a question put by the witness, whether he had read the paper produced, the testator said he had heard it read; and being asked if it was all right, he replied, "I think so;" and the other witness testified that when they entered the room the testator remarked that he wanted them to "witness his signature;" that they then put their names to the paper as witnesses, but that nothing was said as to "what the paper was, or anything about it;" that the witness never read it, and did not know what it was. *Held*, that this was not a sufficient publication: *Id.*